United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-1327

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1327

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BENJAMIN MALLAH,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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OTHER CITES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74 - 1327

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

BENJAMIN MALLAH,

Defendant-Appellant

BRIEF FOR APPELLANT BENJAMIN MALLAH

Preliminary Statement

The Appellant, BENJAMIN MALLAH, appeals from a Judgment of Conviction in the United States District Court for the Southern District of New York, adjudging him guilty of one count of violating Title 21, United States Code, Section 846. As a result of this conviction, the Appellant was sentenced to the custody of the Attorney General, or his duly authorized representative, for a period of Ten (10) Years. In addition,

a Special Parole of three years was imposed, together with a $25,000 fine. The Appellant is presently at liberty on bail pending appeal.

The Indictment appears on page 10 of the Appellant's Appendix.

STATEMENT OF THE FACTS

The Appellant, BENJAMIN MALLAH, was named, along with twelve other defendants, in an eight-count Indictment charging violations of the Federal Narcotics Laws.[1] In support of the Indictment, the Government sought to establish the existence of a widespread conspiracy, the objective of which was the distribution of kilo quantities of heroin and cocaine in New York City.[2] Broadly stated, the theory of the Government's proof against the Appellant was that MALLAH financed the illicit activities of one of the "core" conspirators, Herbert Sperling.[3] (Footnote on next page)

The Government's proof essentially focused on the testimony of four individuals who described their own participation

[1]Four of the twelve were tried along with the Appellant. Only the defendant, Alfred De Franco, was acquitted by the jury.

[2]This was a companion case to United States v. Sperling, No. 73 CR 330.

with one or more of the defendants on trial.[4] Cecile Mileto, a witness with a history of drug addiction and abuse (T 212 - 216),* testified that in May, 1971, she resided with her husband, Louis Mileto, a named co-conspirator (T 9), who gained his livelihood by "cutting heroin". (T 37) Mrs. Mileto testified that her husband had at one time told her that his employer was the co-conspirator, Herbert Sperling. (T 38)[5] Cecile Mileto then testified that she first met Herbert Sperling in July of 1971 at his apartment in Lower Manhattan. (T 38) Subsequent meetings with Sperling occurred in a midtown barbershop which, according to later testimony, was the scene of conspiratorial meetings, and at Sperling's home in Bellmore,

[3]Counts 5, 6 and 7 of the Indictment charged the Appellant with substantive offenses which were never proven. As against the Appellant, these counts were dismissed at the end of the Government's case. (T 1296)

[4]There was no proof elicited at trial that the Appellant, MALLAH, was directly involved in the sale or distribution of the narcotic drugs.

[5]The Government's theory was that the Sperling faction supplied heroin to the conspiracy, while the defendant, Pacelli, furnished cocaine. (Government's opening, p.10)

*In view of the fact that the entire transcript is reproduced in the Appellant's Appendix, page reference will correspond to the transcript pages.

Long Island. (T 38)

Mrs. Mileto expressed familiarity with Joseph Conforti, a co-conspirator who testified for the Government. Mileto recalled that in the Summer of 1971, there were daily meetings at Conforti's gas station in the Bronx, during which her husband either deposited or obtained packages which were put into the trunk of their car. (T 40) Although the witness had no knowledge of what was in the packages, she accompanied her husband several times when the packages were delivered to various locations in the Bronx and Queens. (T 42 - 43) On one occasion, the witness discovered what she later learned to be pure heroin in a closet of her house. (T 41 - 42) On another occasion, while with Louis Mileto on one of his deliveries to the Bronx, the witness noticed that one of the packages contained a "plastic bag of white powder". (T 46)

The witness, Mileto, also testified that she knew the Appellant, BENJAMIN MALLAH. (T 46) Although uncertain as to when she first met the Appellant, the witness recalled that in December of 1971, while at the Sperling apartment, she observed Sperling counting $75,000 which was placed into an attache case and given to the Appellant. (T 49 - 50) According to the witness, Sperling stated to MALLAH that "$75,000

isn't too bad a haul". (T 50) While the money was being counted, Peter Salanardi, a named co-defendant, arrived with a paper bag containing a sum of money which became part of what was purported to be the $75,000. (T 50)

On yet another occasion in the Summer of 1971, Mrs. Mileto was asked by her husband to bring "a cut" or dilutant to Ballentine's Barbershop on Seventh Avenue and 54th Street in Manhattan. (T 51) There she met her husband who took the dilutant and gave her cab fare to return home. (T 51)

In February of 1972, Louis Mileto was arrested with "a few kilos of heroin" which, according to the witness, was being delivered to one Mark Reiter, another conspirator. (T 9, 54) Following this arrest, the witness described a subsequent meeting with Herbert Sperling, during which Sperling admonished Louis for doing business with "Mark Reiter". (T 55)

After another witness had been taken out of turn, (T 55 - 56), Mrs. Mileto resumed the stand and, in a most extraordinary fashion, recalled another visit to the Sperling apartment at 5 Spring Street with the Appellant, MALLAH, present. (T 204 - 205) The witness testified that at that meeting, there were bags of white powder on the kitchen table and as Sperling placed

these bags into a shopping bag, MALLAH was alleged to have said, "Are you going to have enough money for this?" (T 205) The shopping bag was then taken by Louis Mileto and placed in the trunk of his car. (T 205) On cross-examination, the witness conceded that in prior interviews with Government agents, prosecuting attorneys and appearances before Federal Grand Jurys, she had never mentioned this "white powder" incident. (T 231)

Barry Lipsky, a self-confessed perjuror (T 57), testified that in the Spring of 1971, he was employed by the defendant, Vincent Pacelli, Jr., in "narcotics work". (T 59) Initially, Lipsky's role was to guard a quantity of heroin stored at an apartment on Manhattan's upper East Side. (T 62) Thereafter, Lipsky moved into this apartment and assumed the name Harold Stella. (T 65) Shortly after moving into the apartment, the witness recalled going to an apartment in the Murray Hill section of Manhattan where Pacelli and a girlfriend, Beverly Jalaba, were living. (T 67) There, the witness picked up two large shopping bags containing equipment used in the packaging of narcotics. (T 67 - 68) For the next ten or eleven months, Lipsky continued to work for Pacelli and remained in charge of the "stash" or inventory. (T 69) Lipsky

also testified that narcotics were stored at an apartment on East Ninth Street in Manhattan which was occuppied by another named co-conspirator, Susan Weyl. (T 9, 70)

Recounting the details of his participation, Lipsky stated that there came a time when he learned to dilute and package heroin. (T 72) Additionally, the witness was schooled on crudely fundamental tests which could be performed on narcotics to determine their quality. (T 74 - 80)

As time went by, Lipsky, according to his testimony, was entrusted with additional responsibilities including the delivery of large quantities of narcotics and changing cash into larger denominations. (T 80 - 81) In May or June of 1971, Lipsky, while with Pacelli, met Herbert Sperling for the first time. (T 82 - 83) The initial meetings occurred at the Seventh Avenue barbershop and the Sperling apartment on Spring Street. (T 82 - 83) On one occasion, Lipsky was asked to remain a distance away while Pacelli conferred with Herbert Sperling in the company of Louis Mileto and the Appellant, MALLAH. (T 87) After the conversation, Pacelli returned to Lipsky and instructed him to mix and package a half of kilo of cocaine for Louis Mileto. (T 88 - 89) Lipsky then described the circuitous manner in which the delivery was

accomplished. As these transactions become relevant to the issues raised on appeal, they will be discussed in more detail. On cross-examination, it was made clear that Lipsky never met or spoke to the Appellant, MALLAH. (T 526)

Susan Weyl, a named co-conspirator, substantially corroborated Lipsky's assertion that heroin and cocaine was stored at her apartment. (T 560 - 561)

The next co-conspirator-witness to testify for the Government was Joseph Conforti, who was introduced to the narcotics business by Louis Mileto. (T 647 ff) In June or July of 1971, Mileto, according to Conforti, stored items kept in boxes and suitcases on the premises of Conforti's gasoline station. (T 648) Later, Conforti discovered that these packages contained sundry items attendant to the narcotics business, including manitta and milk sugar which served as dilutants. (T 649) Describing his business, Mileto told Conforti that he worked for Herbert Sperling. (T 650) Thereafter, Conforti's direct involvement began with a trip to Philadelphia with Louis Mileto to deliver a kilo of heroin. (T 652) In Camden, New Jersey, Conforti observed Mileto deliver the package and receive what was purported to be $60,000 in cash. (T 652) When asked whether the money was going to "Herbie", Mileto

stated that it was going to "Bennie", Herbie's "partner for money". (T 653) Thereafter, the bills were exchanged for larger denominations and Conforti accompanied Mileto with the package of money to Sperling's Spring Street apartment. (T 655) Some fifteen to twenty minutes later, the witness allegedly observed the Appellant, MALLAH, leaving 5 Spring Street with the box that had contained the money. (T 655)

As the months wore on, Conforti became increasingly more involved in the narcotics business. In August, 1971, the boxes and suitcases stored at the gasoline station were transferred to an apartment that Mileto had in Queens and to Conforti's home. (T 658 - 660) Foreseeing the possibility of Mileto being arrested, Conforti was introduced to Sperling, who he was directed to contact in the event that Mileto became unavailable. (T 660 - 661) The meeting with Sperling was at Ballentine's Barbershop. (T 661) Subsequently, Conforti made several deliveries of the packages which contained the dilutant. (T 662 ff) At this time, too, Conforti learned the fundamentals of testing narcotics. (T 665)

After Louis Mileto's arrest, Conforti was instructed by Sperling to take "all the goods" to a certain individual he was to meet on 48th Street and Broadway in Manhattan. (T 696)

The problems created by Mileto's arrest were dramatized at a meeting in the Sperling apartment on Spring Street. Conforti testified that in the presence of the Appellant, MALLAH, Sperling was chastizing Mileto for his conduct. (T 700) After "yelling" at Mileto, Sperling turned to MALLAH and said "I told you so". In reply, MALLAH is alleged to have stated "What could you do". (T 700 - 701)

In March of 1972, Conforti, according to his testimony, became a part of Sperling's narcotics operation. (T 702) Conforti's duties included mixing heroin in various rented hotel rooms. (T 702 ff) At this time, Conforti also described the alleged participation of the defendant, Barney Barrett. (T 713 - 716) In the State Delicatessen on Seventh Avenue, Conforti was alleged to have had a conversation with Barrett concerning dilutant in the Appellant, MALLAH's presence. (T 717) Finally, Conforti's participation ended with his arrest at which time dilutant and mixing materials were seized. (T 743)

Zelma Vance testified that it was her apartment in Queens that was used by Mileto to store his paraphernalia. (T 982 - 983) Miss Vance's testimony served to partially corroborate Conforti's account of the events of the night of Mileto's

arrest. Agents of the Drug Enforcement Administration, who arrested Mileto on February 10th, 1972, also testified concerning the "undercover buy" during which the arrest was effected. (T 994, 1010)

Fortunato De Luca, a New York City Policeman, testified as to surveillance of Ballantine's Barbershop on Seventh Avenue in July and August of 1971 and again in August through November of 1972. (T 1113, 1119 - 1120) During these observations, the policeman saw and photographed various alleged members of the conspiracy including the Appellant, MALLAH, in conversation. (T 1115, 1131 On August 16th, 1972, the Police placed an undercover automobile in front of the Ballantine Barbershop. In the trunk of the automobile was a Patrolman Lino, who was equipped with a radio transmitter. (T 1113) Photographs introduced into evidence pictured MALLAH, Sperling and others in the vicinity of the automobile. (T 1135) According to De Luca, parts of the conversation between Sperling and MALLAH were overheard. (T 1136) Patrolman Gerald Lino testified that from the trunk of the automobile on August 16th, he could overhear the following conversation:

> "The Witness: It was a conversation, again, I said, between Mr. Mallah and Mr. Sperling. Mr. Sperling said to Mr. Mallah, 'I got to

> have the stuff.' Mr. Mallah said, 'Don't worry about it.' Mr. Sperling said, 'Fifty thou; right?' Mr. Mallah said, 'Yes, right, fifty-fifty,' and Mr. Sperling said, 'But I got to have it. You know, I need it'.
>
> He says, 'Don't worry about it. I'll see the people this afternoon, tonight or early tomorrow. You should have it.'
>
> He says, 'But, I need it.'
>
> Q. Who said that?
>
> A. Mr. Sperling says, you know, 'But I need it.'
>
> And again Mr. Mallah said, 'Don't worry about it. If the people were straight, if they are not on the run, we should have it.' " (T 1182 - 1183)

On September 26th, 1972, Lino was again in the trunk of the surveillance auto and overheard conversations between co-conspirator Norman Goldstein and Sperling. (T 1185 - 1186) After qualifying Lino as an experienced officer in narcotics investigations, the prosecuting attorney elicited the witness' opinion that "stuff" meant narcotics. (T 1188 - 1189)

David Samuel, an agent with the Drug Enforcement Administration, testified that on August 17th, 1973, he arrested the Appellant, MALLAH, who was in the possession of various articles of identification in two assumed names. (T 1264, 1267) Additionally, the Appellant had over $8,000 in cash at the time

of his arrest. (T 1263) The agent further testified that he had been attempting to locate MALLAH since April 16th, 1973. (T 1269) It was then stipulated between counsel that if Nancy O'Malley were called as a witness, she would testify that she and the Appellant, MALLAH, were living together in Hallendale, Florida on April 15th, 1973. The stipulation further stated that,

> "There Benjamin Mallah told her he was going downstairs, and when he returned, Benjamin Mallah told Nancy O'Malley 'There's been some trouble. I have to leave.' And after that, Benjamin Mallah then packed his bags and left Miss O'Malley's apartment in Hallendale, Florida." (T 1281)

The defense case on behalf of the Appellant, MALLAH, began with the testimony of six witnesses, including Rocky Graziano, the prize fighter, who established that MALLAH had been a familiar figure in the area of the "Stage Delicatessen" on Seventh Avenue for 25 years. (T 1323, 1330, 1335, 1338, 1343, 1349) In Runyonesque fashion, the witnesses each related that the Appellant was a known bookmaker who took bets from a cross-section of people who included taxi drivers and celebrities(T 1331, 1335) Testifying in his own behalf, the Appellant, MALLAH, acknowledge that as a bookmaker, he had taken

bets on Seventh Avenue for at least 25 years. (T 1366) MALLAH testified that he had known Herbert Sperling for approximately three or four years, having met him in the vicinity of Seventh Avenue and engaged in gambling activities with him. (T 1368 - 1369) However, MALLAH denied that he ever received $75,000 from Sperling and stated further that he had never been in his apartment on Spring Street. (T 1369) MALLAH explained that the assumed names under which he lived were necessary because of the fact that he was a known bookmaker. (T 1371) In fact, the reason that MALLAH suddenly left Florida was rumor of a subpoena issued in Miami regarding his bookmaking activities. (T 1373 - 1374) MALLAH flatly denied any involvement with the sale or distribution of narcotics. (T 1368)

On rebuttal, the prosecution introduced the testimony of Michael Waniewski, who disputed MALLAH's assertion that he had been arrested with more than the $8,540 received into evidence which, according to MALLAH, was his gambling bankroll. (T 1468) Fortunato De Luca was recalled to rebut MALLAH's assertion that he did not know Louis Mileto and that he had never been to Sperling's apartment on Spring Street. (T 1473 - 1475) Finally, Mark Miklitsch, the fifteen-year-old son of Cecile Mileto, contradicted MALLAH's assertion that he did not

know the Miletos and testified that, in fact, he had been present in Sperling's Spring Street apartment with MALLAH and his mother and father. (T 1483)

STATUTES INVOLVED

Title 21, United States Code, Section 846 states as follows:

> "Any person who attempts or conspires to commit any offense defined in this sub-chapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

QUESTIONS PRESENTED

1. Whether the evidence, considered in the light most favorable to the Government, was sufficient to support Appellant's conviction on the conspiracy charge?

2. Whether it was reversible error for the Trial Court to exclude extrinsic evidence concerning a principal witness' willingness to remain silent in return for payment?

3. Whether reversible error was committed where the Trial Court precluded a full inquiry on the particularly heinous murder by a principal Government witness?

4. Whether the prosecutor's summation exceeded the boundries of fair comment thereby depriving the Appellant of his right

to a fair trial?

5. Whether reversible error was committed by the introduction of evidence concerning a narcotics transaction which was not done in furtherance of the conspiracy charged?

POINT I

THE EVIDENCE CONSIDERED IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT WAS INSUFFICIENT TO SUPPORT A FINDING BEYOND A REASONABLE DOUBT THAT THE APPELLANT, BENJAMIN MALLAH, KNOWINGLY AND WILLFULLY PARTICIPATED IN THE CONSPIRACY CHARGED.

The Appellant BENJAMIN MALLAH's broadest attack on Appeal is that the evidence, considered in the light most favorable to the Government, is insufficient to sustain a finding of guilt beyond a reasonable doubt of the conspiracy charge which was the single count on which the Appellant was convicted. UNITED STATES v. TAYLOR, 464 F.2d 240 (2nd Cir., 1972).

It should first be noted that the proof against the Appellant, MALLAH, did not rise to the expectations of either the Grand Jury[6] or the prosecuting attorney. In the Govern-

[6]As previously noted, counts 5, 6 and 7, charging the Appellant with the substantive acts of possession and distribution of Schedule I and II narcotic drugs were dismissed as against the Appellant at the end of the Government's case.

ment attorney's opening statement to the jury, it was alleged that,

> "The government's evidence will show that Mr. Pacelli had large sources of cocaine which he used to distribute to various customers and one of his customers was Mr. Mallah and Mr. Sperling."
>
> * * * *
>
> "It was the testimony - the testimony will show it was Mr. Pacelli's function or operation to deliver cocaine to, among others, Mr. Mallah...."
>
> * * * *
>
> "....from Mr. Mallah, Mr. Sperling, he would receive large amounts of heroin, kilogram quantities,...." (T 10)

In fact, there was no testimony which could support a finding that the Appellant, MALLAH, had either received cocaine or delivered heroin. After exception was taken to the Court's marshalling of the evidence in this regard, at counsel's request (T 1715), the Court gave the following supplemental instruction:

> "There is no evidence in the record to support a statement that Mallah transacted business in cocaine or in heroin in the sense of dealing with the drug. The contetnion here is that he was the moneyman or backer, as you have heard it." (T 1726, 1727)

The question for this Court's consideration, therefore, is whether the evidence elicited at trial concerning the Appellant MALLAH's alleged involvement was sufficient to support a finding of guilty on the conspiracy charge. For a proper analysis of this issue, it is here necessary to review in detail the evidence presented against the Appellant. For the sake of clarity, the evidence will be set forth in the manner in which the witnesses testified.

CECILE MILETO

Cecile Mileto, it will be remembered, presented a vivid recollection of her husband's involvement in the narcotics industry as an alleged employee of Herbert Sperling. (T 38) Initially, Mrs. Mileto testified that she knew the Appellant, MALLAH, having met him on "a couple of occasions". (T 46) More specifically, in December of 1971, the witness recalled being present at the Sperling apartment on Spring Street in Lower Manhattan where Sperling was allegedly counting $75,000 which was put into an attache case that MALLAH was said to have left with. (T 50) During the count, Peter Salanardi, a named defendant not on trial, arrived with a paper bag containing money that was added to the larger sum. (T 50) Additionally, Sperling was reported to have stated to MALLAH

"something to [the] effect" that "$75,000 isn't too bad a haul". (T 50) At the conclusion of Mrs. Mileto's direct testimony, cross-examination by MALLAH's trial counsel was reserved and a second witness was taken out of turn. (T 55 - 56) In perhaps one of the most spectacular displays of recollection refreshed, Mileto resumed the stand one day later and gave additional direct testimony concerning the Appellant's alleged involvement. (T 204)[7] Mrs. Mileto now testified that on an unspecified date or time, she was present with the Appellant, MALLAH, and others at the Spring Street apartment. (T 204 - 205) The witness testified that she observed on the kitchen table a "few bags of white powder" and that after Sperling put the bags into a shopping bag, MALLAH stated "Are you going to have enough money for this?" (T 205) The shopping bag was thereafter taken by the witness' husband, Louis Mileto. (T 205) Mrs. Mileto concluded this aspect of her testimony by conceding that she had no knowledge of what the bags contained. (T 205A)

[7]Cross-examination of Mrs. Mileto revealed that the account of a second Spring Street meeting had never previously been furnished to any investigative body or law enforcement official. (T 231)

BARRY LIPSKY

Barry Lipsky, who, according to his testimony, was an employee of the defendant, Pacelli, in the trading and distribution of narcotics, neither met the Appellant nor had any conversation with him. (T 526) However, during the course of his alleged duties as Pacelli's subordinate, he had occasion to see MALLAH at the Ballentine Barbershop. (T 87) On one occasion, after the witness observed Pacelli in conversation on the sidewalk outside the barbershop with Sperling, Louis Mileto and the Appellant, Pacelli returned and directed Lipsky to give Mileto a quantity of cocaine. (T 88) On another occasion, in the vicinity of the barbershop, Lipsky inquired as to MALLAH's identity. In reply, Lipsky's alleged mentor was said to have stated that MALLAH was Sperling's partner. (T 94 - 96) On subsequent occasions, during the Lipsky-Pacelli rendezvous on Seventh Avenue, MALLAH was seen in the company of Sperling. (T 134, 149)

JOSEPH CONFORTI

Joseph Conforti testified that on his Camden-Philadelphia oddessy with Louis Mileto and his kilogram of heroin, Mileto mentioned that the $60,000 purchase money was "going to Bennie". (T 653) Conforti later recounted that after the money had

been exchanged for larger denominations, Mileto took the package of currency to Sperling's Spring Street apartment. Some fifteen to twenty minutes later, the witness observed MALLAH leave the building with the box in which the money had been wrapped. (T 655) Conforti then asked Mileto "who was that guy carrying the money" and Mileto was said to have replied that "he is Ben Mallah". (T 655)

Shortly after Louis Mileto's arrest on February 10th, 1972, Conforti recalled that he went to the Sperling apartment on Spring Street where MALLAH was present. (T 699) Upon his arrival, Sperling was allegedly discussing a delivery of heroin with Louis Mileto. (T 700) During this conversation, Sperling, apparently frustrated by Mileto's obstinance, was alleged to have stated to MALLAH that "I told you so" wherein the Appellant replied "What could you do". (T 700 - 701)

Later, when Conforti became a more active participant in the alleged conspiracy, the Appellant, MALLAH, was present in the Stage Delicatessen during a conversation with the witness and the defendants, Barrett and Sperling. (T 717) The topic of conversation, according to the witness, was the availability of the "mix" or dilutant for the narcotics. Here, again, there was no testimony that the Appellant participated in the

conversation. (T 717)

STEWART STROMFIELD

Stewart Stromfied, a Federal Drug Enforcement Administration agent, testified as to observations of the Appellant, MALLAH, on April 28th, 1972. (T 1022) On that day, the witness observed Sperling in the company of MALLAH. (T 1023) Continued surveillance found the Appellant in the company of several alleged co-conspirators. (T 1024 - 1025) MALLAH was followed to 1650 Broadway and later to a midtown motel, then back to the barbershop and ultimately to downtown Manhattan where he rejoined Sperling. (T 1028) Cross-examination of Stromfield revealed that he heard none of MALLAH's conversation and had no knowledge of the purpose of the Appellant's meetings. (T 1034)

FORTUNATO DE LUCA

Fortunato De Luca, a sergeant with the New York City Police Department, as previously noted, testified to surveillances of the alleged co-conspirators in the Summer of 1971 and again, in the late Summer and Fall of 1972. (T 113 - 120) On these occasions, the Appellant, MALLAH, was seen in conversation in the vicinity of the Seventh Avenue barbershop with Sperling and other alleged co-conspirators. (T 1115) MALLAH was also

observed in that vicinity during the period in 1972. (T 1131) De Luca's testimony regarding these observations was substantiated by photographs which were introduced into evidence. (T 1117, 1135) De Luca further testified that on August 16th, 1972, a brother officer, Patrolman Lino, was stationed in the trunk of an undercover vehicle parked in the vicinity of the barber-shop. (T 1133) Parts of conversation between Sperling and MALLAH were overheard. (T 1136) Also, during these observations, MALLAH was seen to have given one Joe Lafacci a sum of money. (T 1137)

GERALD LINO

Gerald Lino, a New York City Patrolman, was the patrolman who was assigned to the trunk of the surveillance auto parked on Seventh Avenue. (T 1176) Lino began his surveillance duties on August 2nd, 1972 and had observed MALLAH in the vicinity on several occasions. (T 1174) On August 16th, 1972, while in the trunk of the car that had four holes drilled into it for both sight and air (T 1176 - 1177), he witnessed Sperling and MALLAH in conversation. (T 1177) The conversation overheard, previously set forth in the Statement of the Facts, should again be noted:

"The witness: It was a conversation, again, I said, between Mr. Mallah and Mr. Sperling. Mr. Sperling said to Mr. Mallah, 'I got to have the stuff.' Mr. Mallah said, 'Don't worry about it.' Mr. Sperling said, 'Fifty thous; right?' Mr. Mallah said, 'Yes, right, fifty-fifty,' and Mr. Sperling said, 'But I got to have it. You know, I need it.'

He says, 'Don't worry about it. I'll see the people this afternoon, tonight or early tomorrow. You should have it.'

He says, 'But I need it.'

Q. Who said that?

A. Mr. Sperling says, you know, 'But I need it.'

And again, Mr. Mallah said, 'Don't worry about it. If the people were straight, if they are not on the run, we should have it.' " (T 1182 - 1183)

Lino was later permitted to testify as an officer experienced in narcotics investigations that "stuff" meant a quantity of narcotics. (T 1188 - 1189)[8]

DAVID SAMUEL

David Samuel, a Drug Enforcement Administration agent, arrested the Appellant, MALLAH, in Manhattan on August 17th, 1973. The significance of Samuel's testimony was that the

[8]The absurdity of Patrolman Lino's "expert testimony" that "stuff" was a code word for a quantity of narcotics was demonstrated in trial counsel's cross-examination. (T 1204

Appellant was arrested with possession of articles which evidenced that he had taken assumed identities. (T 1264 - 1267) Additionally, at the time of the Appellant's arrest, he was in possession of more than $8,000 in cash. (T 1263) Samuels testified that the Government had made efforts to locate the Appellant, MALLAH, since April 16th, 1973. (T 1260)

NANCY O'MALLEY

Through a stipulation, the jury learned that if Nancy O'Malley were called to testify,

> "...she would testify that she and Benjamin Mallah were together in Hallendale, Florida on April 15th, 1973. There Benjamin Mallah told her he was going downstairs, and when he returned, Benjamin Mallah told Nancy O'Malley 'there's been some trouble. I have to leave.' And that after that, Benjamin Mallah then packed his bags and left Miss O'Malley's apartment in Hallendale, Florida." (T 1281)

THE DEFENSE

Recently, in determining whether evidence presented at trial was sufficient to support a jury finding of guilty, this Court has looked to the defense case to determine what inferences could reasonably be drawn from the Government's case. UNITED STATES v. FRANK, --- F.2d --- (2nd Cir., February 25th, 1974) sl.op. p.1883.

> "When a defendant has offered no case, it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be permissible if the defendant had supplied a credible exculpatory version." sl.op. p. 1896, 1897.

In the instant case, through the testimony of the Appellant and witnesses called on his behalf, the defense explained MALLAH's association with Sperling (T 1369), and his seemingly continuous presence on Seventh Avenue. (T 1323 - 1382)

THE SUFFICIENCY ARGUMENT

A review of the above stated facts reflects the existence of a substantial number of co-conspirators' hearsay declarations which undoubtedly were of significant moment in the jury's deliberations. The issue for this Court is whether there was sufficient evidence, independent of the hearsay utterances, to infer that MALLAH participated in the alleged conspiracy. It is well-established that although hearsay declarations of a conspirator made in the course of and in furtherance of the conspiracy are admissible against co-conspirators, there must be independent evidence establishing a defendant's participation in the conspiracy before such declarations are admissible against him. GLASSER v. UNITED STATES, 315 U.S. 60 (1942); UNITED STATES v. CALABRO, 449 F.2d 885 (2nd Cir., 1971). It

is equally clear that the necessary independent proof must be substantial and not "too slight". UNITED STATES v. CONSOLIDATED LAUNDRIES CORP., 291 F.2d 563 (2nd Cir., 1961); UNITED STATES v. BENTVENA, 319 F.2d 916 (2nd Cir., 1963).

The Appellant, BENJAMIN MALLAH, contends that the "independent evidence" elicited on the prosecution's case was too slight and far too equivocal to support the introduction of the co-conspirators' hearsay declarations. The Appellant recognizes prior holdings of this Court that "a seemingly innocent act, when viewed in the context of surrounding circumstances, may justify an inference of complicity." UNITED STATES v. CALABRO (SUPRA); UNITED STATES v. GEANEY, 417 F.2d 1116 (2nd Cir., 1969). However, here it is submitted the manner in which the innocent acts would have to be viewed in order to infer complicity, would require a total abridgment of the Constitutional presumption of innocence. This Court has recognized that contacts between alleged conspirators are to be presumed innocent unless the circumstances indicate otherwise. UNITED STATES v. KOMPINSKY, 373 F.2d 429 (2nd Cir., 1967).

Unlike, for example, the defendant Calabro in UNITED STATES v. CALABRO (SUPRA), the Appellant's association with alleged conspirators and presence at places of alleged

meetings was not so closely tied to the actual sale or distribution of narcotics. It is clear that association with conspirators, even coupled with knowledge of the objectives of the conspiracy, is insufficient for a finding of complicity. UNITED STATES v. DI RE, 159 F.2d 818 (2nd Cir., 1947). As in DI RE, it was not enought that Sperling and other alleged co-conspirators felt confident that MALLAH would not betray them, as the law does not make one a participant in crimes which one does not renounce.

In UNITED STATES v. STROMBERG, 268 F.2d 256 (2nd Cir., 1959), it was re-stated that,

> "Mere association with conspirators is insufficient basis for a finding of participation."

There, the uncertainty of the Customs officer's conduct at meetings with co-conspirators led the Court to conclude that,

> "The independent evidence was too slight to warrant the admission of hearsay declarations and too slight to submit to the jury." 268 F.2d at p.267.

The Appellant's conduct, in the case at bar, is analogous. For example, Joseph Conforti testified that at a meeting at the Stage Delicatessen during which the Appellant was present and during which dilutant was allegedly discussed with the

defendant Barrett and others, MALLAH made no contribution to the discussion. (T 717) The testimony, therefore, clearly reflects MALLAH's apparent indifference to what is otherwise described as an important conspiratorial episode. This indifference, it is respectfully submitted, is completely incompatible with a finding of participation. In UNITED STATES v. MC KNIGHT, 253 F.2d 817 (2nd Cir., 1958), the salient test of sufficiency was reduced to whether the defendant was not indifferent to the outcome of the venture. Again, in UNITED STATES v. NOAH, 475 F.2d 688 (9th Cir., 1973), the Ninth Circuit adopted the MC KNIGHT rule and re-stated the principle that,

> "All that is required is that [each conspirator] not be indifferent to its outcome."

Considering here the independent proof in the light most favorable to the Government, nothing more was demonstrated than that the Appellant, MALLAH, was interested in the monies he allegedly received from Sperling. There is no evidence to support a finding that the Appellant was interested in the success of the narcotics operation or that he did anything to insure that that objective would succeed.

Returning again to the CALABRO decision, which this Court

called a "close case", 449 F.2d at p.890, the otherwise innocent activities of the defendant, Calabro, indicated that he had committed himself to the success of the venture. The Court there stressed the fact that before critical discussions between the undercover agents and co-conspirators, Calabro closely scrutinized the agents and participated in "frisking" them or having the agent frisked in his presence. In the instant case, no such caution or interest was displayed. For, when studying Conforti's testimony even closer, when MALLAH was alleged to have responded to Sperling in the Spring Street apartment, while the latter was chastizing Mileto after the occasion of his arrest, the comment "What could you do?" (T 700) is more indicative of a casual observer than an interested participant.

In UNITED STATES v. TERRELL, 474 F.2d 872 (2nd Cir., 1973), this Court reaffirmed the principle that a co-conspirator must make an "affirmative attempt" to further the purpose of the conspiracy. In UNITED STATES v. EUPHEMIA, 261 F.2d 441 (2nd Cir., 1958), this Court reversed a narcotics conspiracy conviction where the Government failed to demonstrate that the defendant had done more than accompany the principal of the crime. The Court further held that the fact that the defendant gave an obviously false explanation when confronted

by the Police did not salvage the otherwise insufficient Government's case. As in JONES v. UNITED STATES, 365 F.2d 87 (10th Cir., 1966), the Appellant MALLAH's presence and his relationship with Sperling were, on the Government's case, entirely a matter of conjecture. And here, too, flight alone is not enough, it is submitted, to sustain his participation in a conspiracy to sell and distribute narcotics.

Plainly stated, from the "independent proof", it was established only that MALLAH had substantial money transactions with Sperling. The Supreme Court, in INGRAM v. UNITED STATES, 360 U.S. 672 (1959), adopted the principle that,

> "Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."

Here, there was simply no evidence to support a finding that the Appellant, MALLAH, had the requisite criminal intent for the substantive narcotics violations. And this claim is made with a view toward the "fair preponderance of the evidence" test set forth in UNITED STATES v. CALABRO (SUPRA):

> "To satisfy the threshold test of admissibility, the government must show by 'a fair preponderance of the evidence independent of the hearsay utterances' that the accused associated

himself with the mutual venture."
449 F.2d at p.889

It should be further stated that, even if the facts allow a finding that money supplied by MALLAH funded, in part, the alleged narcotics conspiracy, there is insufficient independent evidence to find that MALLAH joined that conspiracy.

In UNITED STATES v. FALCONE, 311 U.S. 205 (1940), the Supreme Court, as did this Court, assumed that the Appellants' furnished supplies which they knew ultimately reached and were used by persons operating illicit stills. The defendants there sold sugar, yeast and containers and were charged with conspiracy, along with the actual operators of a large number of stills. The Supreme Court found from the record that there was no proof that Respondents had knowledge of the conspiracy to operate the stills. The evidence showed that the Appellants, or some of them, were seen talking to some of the conspirator-distillers on different occasions. Strikingly similar to the case at bar, one of the Appellants was seen in a restaurant patronized by some of the conspirators, and he knew the proprietor. One Appellant also was seen talking to one of the distillers who was his brother-in-law. The Court, in FALCONE, observed that the jury could have found that the two Appellants

knew one of their customers was using the purchases from them for illicit distilling, and stated that,

> "But it could not be inferred from that or from the casual and unexplained meetings of some of the respondents with others who were convicted as conspirators that respondents knew of the conspiracy."

It was further stated that,

> "One who without more furnishes supplies to an illicit distiller, is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the distiller was a party but of which the supplier had no knowledge."

See, also, UNITED STATES v. STEELE, 469 F.2d 165 (10th Cir., 1972). Moreover, as indicated above, it was necessary for the proof to show that the Appellant, MALLAH, had an interest in seeing that the conspiracy succeeded or that he was not indifferent to the success of that conspiracy. In the case at bar, the record is bare of any evidence which would support a finding that the requisite interest was present.

In commenting on the phenomenon of conspiracy prosecution in modern law, Mr. Justice Jackson, in KRULEWITCH v. UNITED STATES, 336 U.S. 440 (1949), cautioned that,

> "Even when appropriately invoked, the looseness and pliability of the [conspiracy]

> doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." 336 U.S. at p.449

In the instant case, it is submitted, a finding that the independent evidence concerning the Appellant, MALLAH, was sufficient to implicate him as a member of the conspiracy to distribute narcotics would require the blanket of the conspiracy doctrine to grow geometrically. It is here respectfully submitted that the unilateral inferences of guilt which must be drawn from the facts presented would create an intolerable abridgement of the presumption of innocence.

As demonstrated above, one significant aspect of the FALCONE case was that there was insufficient evidence to support a finding that the Respondents had knowledge of the conspiracy charged. The question presented in the instant case is not directly parallel to FALCONE. Here, when the evidence is considered in the light most favorable to the Government, there is an arguable basis for a finding that the Appellant, MALLAH, had some knowledge of the existence of the conspiracy. This knowledge, however, is in and of itself, insufficient unless it were demonstrated that the Appellant had an interest in seeing that the narcotics conspiracy succeeded. If, for example, Sperling owed MALLAH

large sums of money and MALLAH was concerned with the obligation and nothing more, the evidence, it is submitted, would be wholly insufficient to support a finding that MALLAH joined in the conspiracy. Simply stated, the charge under which the Appellant was convicted was a conspiracy to violate the substantive federal drug control laws.[8] A further comparison to the FALCONE case may underscore Appellant's point. If the evidence had demonstrated that an individual had supplied the manitta or dilutant to the conspiracy, similar to the sugar and yeast in FALCONE, and was found to possess knowledge of the conspiracy, the element absent in FALCONE, a defendant raising this issue would be faced with a far more difficult situation. A fact situation such as that at bar, where money is alleged to have been supplied, is strikingly dissimilar. When an individual or an alleged conspirator supplies milk sugar, for example, that is used for cutting and dilution, the circumstances are almost self-explanatory as the dilutant

[8]Despite the fact that the conspiracy charged was a violation of Title 18, United States Code, Section 846, the Court, in its charge, instructed the jury with specific reference to Title 18, United States Code, Section 371. (T 1667) This fact is noted only parenthetically because of this Court's decisions in GENOVESE v UNITED STATES, 378 F.2d 748 (2nd Cir., 1967); UNITED STATES v. BARRATTA, 397 F.2d 215 (2nd Cir., 1968).

is a known and necessary element of the cutting process. By comparison, the money transactions in the instant case are completely unexplained. There was absolutely no proof that the alleged supply and return of money bore any relation to the success of the conspiracy. Was the money to be returned whether or not the operation succeeded? Did the amount of money depend on a profit factor? Or were these simply financial transactions with a conspirator where the alleged lendor was indifferent to the outcome or success of the conspiracy? It is here alleged that the flaw in the Government's case is the fact that the evidence, or more specifically, the independent evidence, does not furnish these answers or clearly define the Appellant's role. In terms of Section 846, Title 21, United States Code, the statute does not proscribe conduct such as that proven at bar.

In support of the above contention, reference can be drawn to another area of the Federal Criminal Code. Title 18, United States Code, Section 894, referring to extortionate extensions of credit, deals with conspiracy to collect extensions of credit by extortionate means. In enacting the extortionate credit statutes, the Congress recognized that financing a Section 894 conspiracy, did not necessarily fall

within the conspiracy itself. Thus, the enactment of Section 893 provides:

> "Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both."

It is for the legislature, therefore, to enact a separate statute to punish an individual who advances money "with reasonable grounds to believe" that it is being used to finance a narcotics conspiracy. On the facts developed at bar, the evidence never went beyond demonstrating that the Appellant, MALLAH, was a trader in money and was totally insufficient to support a finding that the Appellant had joined a conspiracy to trade in narcotics.

THE HEARSAY DECLARATIONS

In the framework of the Government's case against the Appellant, BENJAMIN MALLAH, perhaps the most critical evidence as to the Appellant's alleged role in the conspiracy was elicited in the testimony of Joseph Conforti and Barry Lipsky. It will be remembered that over objection, Lipsky was permitted to testify as to a conversation with Pacelli, outside of the Appellant's presence, where Pacelli allegedly stated in effect that MALLAH was Herbert Sperling's partner. (T 94 - 96)* Similarly, and again over objection, Conforti testified that Louis Mileto had told him that MALLAH was Sperling's "partner for money". After objection, Conforti testified that,

> "I wanted to find out who was Benny. And he explained to me, Benny was Herbie's partner, his backup man for money problems. If you needed money in the junk business, Benny was there to give him money. And this money was to be delivered to Benny." (T 653)

On the authority of UNITED STATES v. PUCO, 476 F.2d 1099 (2nd Cir., 1973), Appellant submits that these statements should have been excluded and that their admission was reversible error. This charge is predicated upon an assertion that the statements

*Objection was made with specific reference to United States v. Puco, 476 F.2d 1099 (2nd Cir., 1973).

cannot withstand a "Puco analysis".

INDICIA OF RELIABILITY

The initial question is whether with regard to each of these statements there was a sufficient indicia of reliability or whether the statements were "obviously reliable". Even the most cursory comparison between PUCO and the case at bar indicates that the facts presented here are markedly different. In PUCO, Gonzalez made statements to Agent Ellin which obviously related to matters within his personal knowledge. In other words, Gonzalez had direct knowledge of his source of the drugs and the Court found that,

> "There is no reason to question the accuracy of Gonzalez's identification of Puco as his source." 476 F.2d at p.1104.

The instant case is dramatically different. Even if Pacelli and Louis Mileto were being perfectly candid in disclosing to Lipsky and Conforti respectively what they believed MALLAH's role to be, there is no indication as to the source of their knowledge. There is no evidence here that either Pacelli or Conforti dealt directly with MALLAH and, indeed, the evidence supports a categorical inference that they did not. Where, then, did they learn this information which was so critical to the Government's case? Was it the subject of casual rumor or

suspicion? These unanswered questions, it is respectfully submitted, dramatically highlight the confrontation problem exhaustively discussed in the PUCO case.

THE RELATIVE IMPORTANCE OF THE HEARSAY STATEMENTS

As demonstrated above, Appellant claims that the statements allegedly attributed to Pacelli and Mileto are not "clearly trustworthy" and yet were both "crucial" to the prosecution and "devastating" to the Appellant. DUTTON v. EVANS, 400 U.S. 74 (1970), opinion of Justice Stewart. The statements here in issue were unquestionably critical to the Government's case. In PUCO, it was stated that,

> "A jury could well have convicted Puco based upon prior events and what Ellin had observed of Puco's and Gonzalez's entries into the building and their respective departures from it, Gonzalez with cocaine." 476 F.2d at p.1104.

Here, the question is far closer. MALLAH, as previously indicated, was never directly tied to the sale or distribution of narcotics. Each of his independent acts were equivocal. These hearsay statements, however, echoed the Government's allegations that MALLAH was the financier of the conspiracy. The effect of these statements on the jury's deliberation can in no way, it is submitted, be de-emphasized. Therefore, in determining whether the right to confrontation was denied the seemingly

threshold question of the relative importance of the statements, is satisfied in favor of the Appellant.

It appears, therefore, that this case contains a classic example of an instance where an Appellant's Sixth Amendment right to confrontation was denied by the introduction of hearsay conspiratorial statements. For this reason, it is submitted, the introduction of these statements was reversible error.

FAILURE TO PROVE A SINGLE CONSPIRACY

Plainly stated, Appellant claims that the evidence elicited at trial cannot support the Government's charge that there existed a single conspiracy of which the Appellant was a member. In other words, if the Government has proven that there was multiple conspiracies and that the Appellant was not a common member, there would be insufficient evidence to sustain the conviction. UNITED STATES v. BORELLI, 336 F.2d 376 (2nd Cir., 1964). In the instant case, it is clear that the Government has proven two separate and distinct conspiracies -- the alleged Sperling heroin conspiracy and the alleged Pacelli cocaine conspiracy with the two conspiracies allegedly selling and buying from each other. The evidence discloses that Pacelli had a separate and distinct group, namely, Lipsky, Perez and Grassa. (T 70, 71, 338) Sperling was an alleged supplier to Pacelli. (T 94) In turn,

Pacelli on an occasion sold narcotics to Sperling. (T 143, 146, 148, 150) Additionally, through Lipsky's testimony, deliveries of narcotics were made to still another group made up of Catino and Alfred De Franco. (T 113 - 115, 117 - 120, 127)

It is submitted that the Pacelli group who were mainly buyers from Sperling, did not comprise part of the alleged Sperling conspiracy. Since the concepts of commercial usage are so heavily relied upon in the proof of a conspiracy, it would seem that a "buyer" is not a "partner" or "agent" of the supplier. It is fundamental that the buying of merchandise or commodities establishes no principal-agency relationship, nor do such transactions establish that a buyer is the partner of a vendor. There is no proof in this record that the role assigned to the Appellant showed that he had any stake in regard to what Pacelli, Lipsky and the others were doing when the allegedly received the narcotics. In effect, with the evidence viewed in the light most favorable to the Government, when Sperling caused transfer of narcotics to the Pacelli group, that ended the matter. All that remained was payment to Sperling. What Pacelli did with the narcotics was of no concern to the alleged supplier. Therefore, the seller had no stake or interest in Pacelli's enterprise; see UNITED STATES v. FALCONE (SUPRA); UNITED STATES v. DI RE (SUPRA).

Assuming arguendo, therefore, that the Appellant, MALLAH, had joined the "Sperling conspiracy", the proof would indicate that this was not the same conspiracy charged in the Indictment.

POINT II

SINCE THE COURT GRANTED A MOTION FOR A JUDGMENT OF ACQUITTAL AS TO THE SUBSTANTIVE COUNTS INVOLVING THE APPELLANT HEREIN, BENJAMIN MALLAH, COUNTS 5, 6 AND 7 OF THE INDICTMENT, THE COURT ALSO SHOULD HAVE DISMISSED COUNT 1 CHARGING THE CONSPIRACY.

Counsel for the Appellant moved for a Judgment of Acquittal under Rule 29 of the Federal Rules of Criminal Procedure at the end of the Government's case. (T 1295 - 1296) The Court granted it as to substantive counts numbered 5, 6 and 7. (T 1296) The colloquy attendant to the Motion, discloses that the Government opposed the Motion on the ground that since the Appellant was joined in a conspiracy, he was subject to a penal liability under the substantive counts. PINKERTON v. UNITED STATES, 328 U.S. 640 (1946).

In UNITED STATES v. CANTONE, 426 F.2d 902 (2nd Cir., 1970), this Court considered the issue as to a co-defendant named Rosen. The issue was whether he was a member of a conspiracy to defraud the United States out of its tax revenue; Rosen was also found guilty for the substantive offense of violating the applicable revenue laws. The proof showed that the act was done and that the defendant Rosen was with the co-defendant.

It was held that because the conviction for the commission of the substantive act was based on a participation in a pre-existing conspiracy, therefore, the thrust of the case was as to whether there was a conspiracy. This Court held, on page 904, in regard to this that the fact that the Government witnesses testified that they observed the defendants together at a certain race track did not establish that they were members of a conspiracy. Hence, this Court concluded that Rosen could not be liable under the substantive count.

In this case, the Court below indicated that the Government's argument "narrowed" counsel's argument and invited Appellant's counsel to address himself to that issue. It is, therefore, submitted that the Court held that standard to be determinative of the Motion. Nevertheless, the Court granted the Motion as to the substantive counts but denied it as to the conspiracy count. At the end of the entire case, this Motion was again made in behalf of the Appellant and it was denied. (T 1491 - 1492) This case then presents the question as to whether the Court's favorable determination as to the Motion for a Judgment of Acquittal constituted a ruling that the Appellant was not a member of the conspiracy charged in the first count of the Indictment.

At the outset, counsel for the Appellant is not merely arguing inconsistent verdicts, e.g. the jury's conviction and the Court's acquittal. It is submitted in this respect that the Court's favorable disposition of the Motion could not be deemed "an inconsistent verdict with that of the jury" because that term is to be understood as where a jury renders inconsistent verdicts at the end of one trial involving a multi-count Indictment.

Rather, counsel has to commence with citing UNITED STATES v. MAYBURY, 274 F.2d 899 (2nd Cir., 1960). This Court held in that case that where the Judge is the sole trier of the facts in a criminal case, and where the jury is thus waived, the Judge may not render a verdict of not-guilty on one count and guilty of another count where, because of the common questions of fact, the verdicts are thus inconsistent; this Court stated on page 903 that:

> "None of these considerations is fairly applicable to the trial of a criminal case before a judge. There is no 'arbitral' elements in such a trial. While the historic position of the jury affords ample ground for tolerating the jury's assumption of power to insure lenity, the judge is hardly the 'voice of the country', even when he sits in the jury's place. If he deems an indictment multiplitious, he

> is only to say so, and the time for him to exercise any 'lenity' that he deems warranted his on sentence. There is no need to permit inconsistency in the disposition of various counts so that the judge may reach unanimity with himself; on the contrary, he should be forbidden this easy method for resolving doubts..."

At the other end of the gradient of the values involved in a criminal action, a jury may in one trial render inconsistent verdicts. This rule was just recently reiterated by this Court in UNITED STATES v. ZANE, et al., docket nos. 73-2041, 73-2450, decided April 1, 1972, sl.op 2493, at pp. 2500, 2502, footnote 3, 2503. There the Appellants were indicted for a conspiracy as well as substantive counts. The jury initially acquitted the Appellant of a conspiracy. They then continued their deliberations as to the substantive counts. During their deliberations, they retired for the night. When the jury the next day continued their deliberations, a note was given to the Court showing that one juror indicated that he could not convict under the relevant substantive count unless he changed his vote on the conspiracy count. The conspiracy count, however, was decided by the jury favorably. Therefore, this was impermissible. This, therefore, gave the case an unusual posture. While this Court recognized the validity of inconsistent verdicts by the jury, in that case, in the

present appeal, there is a hybrid situation. Thus, in UNITED STATES v. TAYLOR (SUPRA), this Court adopted the rule enunciated in CURLEY v. UNITED STATES, 160 F.2d 229 at page 243 of 464 F.2d. The CURLEY rule recognized that there was a need to prevent jury speculation or pure subjectivism at arriving at a verdict and that the basic issue was reasonable doubt as to guilt or innocence. Hence, it was concluded that the point of reference in deciding a Motion for Judgment of Acquittal was whether there was evidence upon which a reasonable jury could have a reasonable doubt and, if that be the case, the Judge should grant the Motion. On the other hand, it was held that if a "reasonable mind" may fairly have no such doubt or may have such a doubt, then the case should go to the jury for a decision.

In this case, it appears that the Government conceded that counts 5, 6 and 7, joining the Appellant herein, was based on conspiratorial complicity attributed to the Appellant and that while the Appellant committed no act upon which any liability could be fastened on him, he would nevertheless be liable if he were a member of the conspiracy. (T 1295) It is submitted, therefore, that the Court approved this approach by the Government because the Court did state that the Government's

argument "narrowed" the issue. (T 1296)

It is now contended that the Court's favorable ruling constituted collateral estoppel, see ASHE v. SWENSON, 397 U.S. 436. That case held that the Fifth Amendment, providing for a rule against double jeopardy, was binding on the State. However, it was further recognized that collateral estoppel, long ingrained in federal criminal law, was a part of the Fifth Amendment's provision against double jeopardy.

In UNITED STATES v. MEYERSON, 24 F.2d 855 (2nd Cir., 1928), this Court considered an appeal by one of the defendants named Katz. Katz was acquitted at a former trial by a direction of the Court to the jury to return a verdict of not guilty. Katz was tried at the first trial for mail fraud. Subsequently, Katz, with others named in the former Indictment, were reindicted for a conspiracy to violate the Bankrupcy Act. The mail fraud involved a scheme that was a part of the conspiracy charged in the second Indictment. The Court reversed the conviction for conspiracy holding, on page 857, that:

> "The question of fact which was distinctly put in issue and determined upon the trial of Katz upon the former indictment was his participation in the devising of a scheme to defraud creditors...., and it was there directly determined that the defendant Katz had no knowledge of, and did not participate in devising or executing that scheme to defraud. The pending

indictment includes the same fraud within its description of the general conspiracy with which the defendant Katz is now charged in the pending indictment. Katz's participation in the scheme, whether it be called a scheme to defraud or a conspiracy, is no longer open to inquiry to any proceeding between him and the United States. Nor can the effect of former adjudication of acquittal be avoided by adding new elements to the old scheme, and thus broadening the charge of conspiracy. The old scheme is still alleged as an essential part of the conspiracy and while it may be that the defendant Katz could be indicted and tried for a separate conspiracy between the same individuals relating to the bankruptcy..., his non-participation in a conspiracy which includes that concern, has been conclusively determined."

See also, YAWN v. UNITED STATES, 244 F.2d 235 (5th Cir., 1957), at page 237 stating that:

"In the present case the government had, and has, every right to establish the guilt of the accused as a separate offense of conspiracy to violate the liquor tax laws despite the acquittal of unlawful possession of the still...But to allow the government to have a second opportunity to establish the precise fact of possession decided by another court of competent jurisdiction in favor of the accused is to ignore the rule that...'the same facts cannot be twice litigated by the same sovereign against the same defendant'..."

In UNITED STATES v. KRAMER, 289 F.2d 909 (2nd Cir., 1961), the Appellant was charged with a conspiracy to break and enter certain post offices to commit larceny. A second count charged him with a conspiracy to do the same thing as to different post offices in a different location; the third count charged

the Appellant with a conspiracy to receive property stolen from post offices; the fourth count charged the substantive offenses relating to the reception of stolen property from the Post Office Department. However, prior to the Indictment under consideration, Kramer was acquitted in another District Court on eight substantive counts arising from the two post office burglaries involved in the second Indictment. This Court initially held that the double jeopardy clause to the Fifth Amendment was not involved. But this Court did hold that the doctrine of collateral estoppel was relevant to the disposition of the appeal and to the extend indicated by the Court, such doctrine required a reversal of the conviction.

Most noteworthy on page 915 of the opinion, this Court saw a relationship between conspiratorial liability and the distinct liability arising from accessorial liability under Title 18, United States Code, Section 2. Thus, on page 915, this Court stated:

> "Considering the matter 'in a practical frame and viewed with an eye to all the circumstances of the proceedings,' as the Supreme Court has directed, Sealfron v. United States, ... 332 U.S. at page 579...It would seem rather plain that the admission of evidence showing Karmer's liability as a principal or as an aider or abettor to the offenses charged in the first indictment violated the rule. Also stated in Sealfron, 332 U.S., at page 578...

that the Connecticut verdict 'operates to conclude those matters in issue which the verdict determined though the offenses be different.' "

On page 916, this Court further stated that:

"...the very nub of collateral estoppel is to extend res judicata beyond those cases where the prior judgment is a complete bar. The government is free, within the limits set by the Fifth Amendment...to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the government may consider the determination to be."

Further on, this Court stated on page 918 of the opinion that:

"...this is a very long way from indicating an intention to permit the government to submit proof of substantive offenses of which the defendant has been acquitted, in support of charges for conspiracy and another substantive offense arising out of the same course of conduct."

While it may be contended that in this case there was one trial and not two trials, it is nevertheless submitted that, from a realistic point of view, such fortuitous circumstances do not affect the relevancy of collateral estoppel, as argued in this case. By joining the conspiracy count and the substantive counts and having one trial, this Appellant was circumstanced disadvantageously to the case where a person is subjected to two trials. 71 COLUMBIA LAW REVIEW, 321:

"Ashe v. Swenson: Collateral estoppel, double jeopardy and inconsisten verdicts."

On page 334, it was commented that:

> "It seems altogether possible that the rule will not always operate in defendant's favor; an inconsistent acquittal and conviction may be the result of prejudice or confusion, for example. Where this is conceivably the case, the rule requires some modification. It also appears somewhat inconsistent with our notions of the jury system to give full weight of a conviction and none to an acquittal when the two are incompatible. After Sealfron and Ashe, such verdicts place a greater hardship on a defendant who is tried on all possible counts at once then on the one who is subject to separate trials. The latter will not even be tried a second time if he is acquitted the first time, while the former will suffer conviction. Such a result should hardly be justified by invoking the need to preserve a jury discretion, since it is the defendant who is supposed to be protected by that discretion and who will presumably appeal an inconsistent verdict."

It is further submitted that the Court's disposition in this case of the Appellant's Motion for a Judgment of Acquittal as to the entire Indictment, violated the due process clause of the Fifth Amendment to the Federal Constitution; furthermore, since the concept of "due process" may involve equal protection of the law, it is further put that the Court below denied the Appellant an equal protection of the law. See SCHNEIDER v. RUSK, 377 U.S. 163, 168 (1964).

POINT III

THE TRIAL COURT'S REFUSAL TO ALLOW EXTRINSIC EVIDENCE THAT A PRINCIPAL GOVERNMENT WITNESS HAD ATTEMPTED TO EXTORT MONEY FROM AN ALLEGED CO-CONSPIRATOR IN RETURN FOR THE WITNESS' SILENCE, WAS REVERSIBLE ERROR.

On cross-examination of Joseph Conforti, one of the principal co-conspirator-witnesses, trial counsel elicited that in October of 1973, while the witness was in protective custody, he telephoned one Sam Kaplan in an attempt to obtain $10,000 from Kaplan in a quid pro quo where Kaplan would not be involved in a certain narcotics transaction. (T 779 - 780)[9] The conversation between the witness Conforti and Kaplan, who recorded the conversation, was explained by the witness in the following manner:

> "On Herbert Sperling's case, I saw Jack Spada. I called him up, told him to give himself up. When I was working for Herbert, I made a delivery, Sam Kaplan had an operation on his stomach, I think I delivered a kilo and a half of heroin with Jack. Jack told me to contact Sammy and for $10,000, he

[9]Sam Kaplan was named in the original Sperling Indictment and was acquitted by the Trial Court at the end of the Government's case. Although the Trial Court placed great emphasis on the acquittal (T 795 - 798), Kaplan was certainly not a stranger to the action.

would keep his mouth shut because he knew I didn't testify about Herbie on Sperling's case and that if - tell Sammy that - if I don't get in touch with him, he knows that I am a Government witness and that if he spoke, naturally, the Government would speak to me and I would tell them that I have delivered a kilo and a half of heroin with Jack at his hospital bed. There was two cousins of his that lived in Brooklyn that were there when I made the delivery. Jack was waiting on the level - in other words, he was with me when I made the delivery. So Jack says, if you don't contact him, he is going to tell the Government, be with the Government and when he tells the Government, they will tell me, Joe, did you make the delivery to Sam Kaplan. Naturally, I will tell them yes. So he told me to call up Sam Kaplan, tell him he wanted $10,000 to keep his mouth shut." (T 779 - 780)

In other words, the witness explained that in this "extortive act", he was an agent for another co-conspirator, Jack Spada, and in substance, the witness himself was making no effort to change his testimony in return for $10,000.

On cross-examination, Appellant's trial counsel explained to the Trial Court outside the presence of the jury that it was the defense's intention to offer the tape and accompanying transcript into evidence and play the tape for the benefit of the jury. (T 802)[10] (Footnote on next page) In response, the Court viewed the matter as follows:

"THE COURT: That's remote. As far as I

> can see, what you are reaching out for is Conforti was guilty of some kind of an offense against federal law for which he might be prosecuted. That is completely collateral and extrinsic evidence couldn't be introduced on that collateral matter." (T 804)

The Court, therefore, regarded this matter as an alleged criminal act which was not the subject of conviction and which could not be proven by extrinsic evidence, a ruling that might be expected regarding an alleged criminal offense completely divorced from the witness' corrupt motive in testifying.

In support of the application to play the tape, trial counsel offered the following interpretation as to its relevancy:

> "The witness Conforti is willing, by virtue of this transcript, to accept money to leave someone out of the case. He also states that in the transcript he left Kaplan out on the prior testimony because of friendship or for whatever reason. I submit to Your Honor that that goes to motive and it goes to the jury making a determination in this

[10]The transcript of the taped conversation appears in Appellant's Appendix at p.1783. The Court directed that the original tape and transcript be kept in the District Court vault "for availability for the Court of Appeals if the case reaches them." (T 1319)

> respect. The government, according to the testimony, is supporting this witness for money and I think the jury would have a right to determine that this witness would say or not say either the negative or the positive for the money either received from the government on the one hand, or from Mr. Kaplan on the other. That's number one.
>
> Number two, when we point to the testimony in this case or his testimony from the government in general, I might add, where he says to Mr. Conforti 'What did they do, put the words in your mouth and have him come right with it' and he said: No, they don't go that far but they sure do - I don't have it in front of me. I think Your Honor remembers the section I'm referring to. It's about half-way into the tape." (T 804 - 804)

A study of the transcribed conversation indicates that a substantial portion of that tape is directly relevant to the manner in which this particular witness would and did testify. Despite an agressive attempt to have the tape introduced into evidence, the Court ruled and delivered an oral opinion that the matter was collateral and extrinsic evidence would not be allowed. (T 810 - 811) Although continued cross-examination was permitted as to some aspects of the conversation, the Court ordered that,

> "The story of the Kaplan payment" was not "to get into this record". (T 815)

On the issue of the payment, the Court further stated that

"I think that the subject has now been covered..." (T 816)

Continued cross-examination, however, elicited the witness' re-affirmation that the "Spada business" was not a lie and that the witness was not to receive any part of the $10,000. (T 836 - 837) Interestingly enough, inquiry of counsel revealed that at the time the phone call was alleged to have been made, Spada was dead. (T 978) On the defense case, the defendants were again precluded from proving by extrinsic evidence that the conversation had, indeed, taken place at a time when Spada was dead. (T 1313 - 1321)

The Appellant, BENJAMIN MALLAH, complains that the Trial Court's failure to permit the introduction of the tape-recorded conversation into evidence and further, the Court's rejection of the defense offer to prove that Spada was dead when the call was made, was reversible error. There is little need of citational support for the proposition that a party may not cross-examine a witness on collateral matters in order to show that he is generally unworthy of belief and may not introduce extrinsic evidence for that purpose. 3 WIGMORE, EVIDENCE, SECTION 977. This limitation, however, does not extend to an instance where it could be demonstrated that the witness had a motive to falsify the testimony he has given.

UNITED STATES v. LESTER, 248 F.2d 329 (2nd Cir., 1957); VILLAROMAN v. UNITED STATES, 184 F.2d 261 (D.C. Cir., 1950) (bias of witness not limited to cross-examination). In UNITED STATES v. KINNARD, 465 F.2d 566 (D.C. Cir., 1972), the Circuit Court found error where the Trial Court refused to allow extrinsic evidence of a witness' narcotic addiction on the following reasoning:

> "Ordinarily, extrinsic evidence may not be used to impeach a witness' general credibility or his specific testimony on a collateral matter. But evidence which is probative of a special motive to lie or fabricate a case against a defendant is admissible because it bears directly on the issue of the defendant's guilt." 465 F.2d at p.573-574

Concededly, the extortion attempt developed in the case at bar, is not an orthodox example of direct motive or bias against the defendants on trial as in UNITED STATES v. LESTER (SUPRA). However, the Kaplan incident clearly demonstrated that Conforti had such an unorthodox approach to his responsibility as a Government witness, that the matter became directly relevant to the issue of the guilt of any defendant against whom he testified. The defense here had offered to prove that, at the time of the telephone conversation with Kaplan, Conforti's alleged principal was dead. It could, therefore, be inferred

that Conforti acted on his own behalf. The entirely corrupt conduct of the witness Conforti in blackmailing any defendant, especially one so closely connected to the conspiracy charge, is a highly material matter to be weighed by the jury after reflecting on the witness' own words in his attempt to "shakedown" an individual.

In EWING v. UNITED STATES, 135 F.2d 633 (D.C. Cir., 1942), it was observed that a witness may be cross-examined as to

> "...his willingness to be unscrupulous in giving testimony, for impeachment purposes; that bias may be shown by extrajudicial statements of the witness from which an inference as to his feelings toward a party may be drawn and by extrinsic evidence independently of cross-examination..."
> 135 F.2d at p.641

In ELLICO v. UNITED STATES, 19 F.2d 323 (6th Cir., 1927), the Court, although affirming the conviction below, held that it was error to exclude evidence of the fact that the Government witness would flee in return for payment. The Court there stated that:

> "A willingness to disappear corruptly is of the same class as a willingness to testify corruptly, although the discrediting effect is more uncertain and remote. Such testimony so touches the specific credibility of a witness that it is admissible."

The only distinction which can be drawn in the case at bar is that the person against whom the corrupt act was perpetrated was not actually on trial.[11]

To draw a distinction between the two situations, it is submitted, is without foundation.

This Circuit also has recognized that evidence of corruption is directly relevant and not limited to cross-examination. UNITED STATES v. BRIGGS, 457 F.2d 908 (2nd Cir., 1972). In UNITED STATES v. HAGGETT, 438 F.2d 396 (2nd Cir., 1971), this Court unanimously reversed a conviction where a principal prosecution witness had attempted to suborn perjury of three prospective witnesses who the Appellant unsuccessfully attempted to call. There, too, the Trial Court rejected the proffer of extrinsic evidence on the grounds that it tended to show only general unreliability of the witness and did not develop any bias specifically related to the charges against the defendant. In overruling the Trial Court, this Court stated:

"That this alleged bias was not merely

[11]This fact was due only to a fortuitous circumstance. If the original Sperling Indictment had been tried in tact, the Appellant, MALLAH, would have been tried with the then defendant Kaplan.

> collateral is suggested by what Appellant sought to prove; specifically, that this bank representative was willing to bribe the three witnesses to testify falsely in order to insure that the desired result was achieved. What is irrelevant, however, is the fact that loans of these witnesses were not the subject of the Indictment. It is the bank representative's alleged hostility, as an officer of the defrauded bank, an alleged willingness to manufacture evidence in order to insure Haggett's conviction that defendant sought and was entitled to elicit from the testimony of his proffered witnesses. If these witnesses testified as indicated, and if such testimony were believed by the jury, reasonable doubt as to the varacity of other prosecution witnesses could certainly have arisen. Proof that one government witness unsuccessfully attempted to suborn perjury of other witnesses could have led a jury to doubt the varacity of other government witnesses - the jury perhaps suspecting that these witnesses were successfully bribed to testify falsely." 438 F.2d at p.399

The similarity of HAGGETT and the instant case is readily apparent. The fact that Conforti was willing to accept money in return for silence is an act which even surpasses HAGGETT's subornation attempt in terms of base corruption. Also irrelevant is the fact that on this particular occasion, the victim of the blackmail was not the subject of the Indictment. And as in HAGGETT, proof that this witness was so despicable in his conduct could have led the jury to doubt the credibility

of the other co-conspirator-witnesses on a suspicion that they, too, were corrupt. The HAGGETT Court, in concluding its opinion, observed that:

> "The reason, of course, for allowing a defendant to introduce extrinsic evidence as to a witness' attempt to suborn perjury is that such conduct indicates a corrupt intent on the part of that witness which necessarily effects his credibility."

In the case at bar, the "corrupt intent" was undoubtedly present and of necessity affected the witness' credibility. By disallowing the introduction of the tape and the extrinsic evidence concerning Spada's death, the jury may have well accepted the witness' representation that he was an unwitting tool in Spada's corrupt plan. The fact that the jury may have been left with this impression, it is respectfully submitted, is intolerable. For this reason alone, therefore, a new trial is required.

POINT IV

THE FAILURE OF THE TRIAL COURT TO ALLOW FULL INQUIRY ON THE WITNESS LIPSKY'S MANSLAUGHTER CONVICTION, WAS REVERSIBLE ERROR.

It is apparent from a reading of the preceding point regarding the witness Joseph Conforti and the cross-examination of Cecile Mileto regarding her own drug abuse and addiction,

that the cast of co-conspirator-witnesses deviated greatly from the accepted norm of human behavior. Barry Lipsky was no exception. Lipsky, who on occasion had shot a television because the vertical hold needed adjustment and who threw a scale into a bay because of an unsuccessful diet (T 499 - 500), testified on direct that as a result of his guilty plea to manslaughter on a murder charge, he was sentenced to an indefinite term with a maximum of twenty years. (T 57 - 58) It was developed on cross-examination that this was a relatively lenient sentence and that the leniency had, in part, been obtained by the Government. (T 471)

On cross-examination, defense counsel attempted to examine Lipsky regarding the details of the homocide. It was the defense contention that only if the jury were made to understand how particularly brutal the homocide had been, would they comprehend the extent of consideration afforded to the witness.[12] Undoubtedly, certain problems concerning the co-defendant Pacelli, who was an alleged accomplice in the murder, would have arisen on such an examination, but this problem was anticipated by defense counsel:

[12]UNITED STATES v. PACELLI, --- F.2d --- (January 11th, 1974) sl.op p.1347

"MR. ROSNER: May I make on thing clear in connection with our application? This present application does not ask the Court for permission to reveal the identify (sic) of Lipsky's accomplice in the murder. That is a line of inquiry which I understand Your Honor has precluded us from following. It merely would elicit from his own participation, his own acts, Your Honor. I would remind the Court most respectfully that in cross-examination of a co-conspirator, especially, the utmost latitude should be accorded counsel." (T 440)

Nevertheless, the Court ruled that,

> "The cross-examiners may inquire into the name of the crime committed, the time and place of the conviction, the punishment, if any, awarded, and any probation or other consideration involved." (T 440)

This Court, in UNITED STATES v. MESSINO, 275 F.2d 129 (2nd Cirl, 1960), clearly set forth the proposition that,

> "Indeed, where the principal witnesses appearing in behalf of the prosecution have a criminal record or have engaged in illegal practices and are accomplices to the crime charged, it is essential to a fair trial that the Court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit."

In UNITED STATES v. ALBERTI, 470 F.2d 878 (2nd Cir., 1972), this Court sustained the District Court's refusal to permit

defense counsel to cross-examine a Government witness about the factual background of his State conviction for third degree assault. The Court, in affirming the conviction, noted that:

> "The conduct involved does not relate to truthfulness or untruthfulness."

However, it is respectfully submitted that ALBERTI is not dispositive of the case at bar. Here, as one trial counsel pointed out, exploration of the factual background of the killing would reveal "an inherently insane" act which would explicitly reveal to the jury the type of individual testifying before them and, as previously noted, only after the jury was exposed to the factual background of the crime, could they fully realize the witness' interest or personal stake in the outcome of the trial. UNITED STATES v. PADGENT, 432 F.2d 701, 704 (2nd Cir., 1970); UNITED STATES v. GONZALEZ, 488 F.2d 833 (2nd Cir., 1973).

It remains, therefore, that in terms of both the witnesses Conforti and Lipsky, the defense was precluded from presenting to the jury a complete basis on which the triers of the facts were to make a determination of credibility. It is here suggested that the cumulation of restricting the defense attack on both Conforti and Lipsky was reversible error.

POINT V

THE PROSECUTOR'S CLOSING REMARKS REGARDING THE CONVICTIONS OF OTHER CONSPIRATORS DEPRIVED APPELLANT HIS CONSTITUTIONALLY GUARANTEED RIGHT TO A FAIR TRIAL.

The factual background of Appellant's claim that he was denied his right to a fair trial by reason of the prosecutor's summation focuses on one aspect of his co-defendant Pacelli's defense case. One of the theory's advanced by counsel for the defendant Pacelli was that Lipsky's account of his alleged involvement with Pacelli was uncorroborated in the sense that no disinterested witnesses substantiated Lipsky's version of the facts. (T 1517)

On direct examination, Lipsky testified to an alleged narcotics transaction and sale executed at the direction of Pacelli and initiated while both he and Pacelli dined at Yellow Finger's Restaurant on Manhattan's upper East Side. (T 102) On cross-examination, Pacelli's attorney elicited the fact that at a prior trial, Lipsky had testified to yet another narcotics transaction with an individual by the name of Valentine at the same Yellow Finger's Restaurant where, again, Pacelli was present. Prior to resting the defense case, Pacelli's attorney was permitted, by stipulation, to introduce

testimony at a prior trial of one Joseph Nunziata, a police officer who had Lipsky and Valentine under observation at the Yellow Finger Restaurant on September 28th, 1971. (T 1457 - 1465) Observing both Lipsky, then described as an unknown male, and Valentine, the officer made no mention of seeing Pacelli. The attorney, in his closing remarks to the jury, asked the triers of the facts to draw the inference that on this trial, Lipsky abandoned the September 28th incident because he now knew that Yellow Finger's had been under observation and Pacelli was not seen there. (T 1520) This theory, although objected to by counsel for the Government, was clearly supported by the record and was an inference that could be drawn had the jury found it attractive. (T 1520)

In order to rebut this inference, the prosecuting attorney not only left the four corners of the record, but injected highly prejudicial and irrelevant material in stating that,

> "I recall Mr. Duke told you on one occasion that he read some testimony yesterday into the record that was about a surveillance of a Valentine By at the Yellow Finger's Cafe, and he read the whole thing, and he said his conclusion was that Mr. Lipsky did not testify about that at this trial because he had found out that he was under surveillance.

Well, the reason that he didn't testify about it at that trial, was that those persons were already convicted, as Mr. Duke well knew, and there was no reason to testify.

MR. DUKE: Objection.

MR. PELUSO: Objection.

MR. MITCHELL: Objection.

MR. LA ROSSA: Objection.

MRS. ROSNER: Objection." (T 1602)

In response to counsels' objection, the Court, obviously disturbed, gave the following instruction:

THE COURT: Ladies and gentlemen, it is my duty again, despite the fact that I have said this before, you are admonished, you are instructed, you are implored, using any word that I can indicate to you, to erase from your minds any of the arguments of counsel on either side, and particularly that last comment, which has nothing and no support in the evidence. It is the evidence in this case which governs, and nothing which has run outside of the evidence, and there have been indications on both sides now of a comment which should not have been made that doesn't relate to the evidence.

Let's get on with the evidence, Mr. Lavin, and your comments about the evidence, and not things that are not in evidence. Let's not have it happen again." (T 1602 - 1603)

Appellant respectfully contends that the Court's attempt to cure the error by giving explicit instructions with regard

to the prosecutor's comments did not repair the damage. Not only did the prosecuting attorney go well beyond the evidence, his remarks informed the jury that another jury at another trial had found persons who obviously were in some way associated with this conspiracy on trial, guilty. In recent months, this Court has not hesitated to reverse where a prosecutor's comments exceed the boundries of fair play. UNITED STATES v. DRUMMOND, 481 F.2d 62 (2nd Cir., 1973); UNITED STATES v. GONZALEZ (SUPRA); UNITED STATES v. MILLER, 478 F.2d 1315 (2nd Cir., 1973); UNITED STATES v. FERNANDEZ, 480 F.2d 726 (2nd Cir., 1973).

In the case at bar, the prosecution's failure to stay within the bounds of permissible comment, advancing issues clearly not supported by the evidence and indeed of a very prejudicial nature, has deprived the Appellant of his right to a fair trial.

POINT VI

THE TRIAL COURT'S FAILURE TO STRIKE THE TESTIMONY OF AGENT POPE AND THE INTRODUCTION OF THE "CARTER" HEROIN TRANSACTION WAS REVERSIBLE ERROR.

John Pope, an agent of the Drug Enforcement Administration, testified that on February 10th, 1972, while working in an

undercover capacity, he negotiated with a Paul Carter for the purchase of a kilo of heroin. (T 994 - 996) Over objection (T 995), Pope continued to describe the manner in which the heroin was obtained. From the testimony, it could be found that the source of the heroin were the two co-conspirators, Mark Reiter and Louis Mileto. (T 997) After the delivery had been effected, a pre-arranged signal was given and each of the participants was arrested. (T 1003)

On the basis of this testimony, the contraband was admitted into evidence over objection of defense counsel. (T 1004 - 1008)

Stewart Stromfield, another agent with the Drug Enforcement Administration, testified as to his role in the undercover activity on February 10th, 1972. After describing his own participation in the arrest of Carter, the agent testified that he arrested Louis Mileto, who was lying down in the front seat of an automobile which had been the apparent source of the drugs. (T 1002, 1021)

At the end of the Government's case, defense counsel unsuccessfully moved to strike the testimony of Agent Pope and the transaction that he testified to on the ground that it had not been connected to the conspiracy. (T 1310 - 1311)

In denying the Motion, the Court observed that,

> "I think his participation offers room for reasonable inferences to be drawn." (T 1312)

It is here respectfully submitted that the record does not support any such inferences.

It is clear that for this action to be admissible against the defendants on trial, it must be found that the act was done not only by alleged co-conspirators, but in furtherance of the conspiracy charged. LUTWAK v. UNITED STATES, 344 U.S. 604 (1953). Here, it is submitted, the record categorically establishes that Mileto's and Reiter's act was not made in furtherance of the conspiracy. The Government's theory at trial rested on an assertion that Herbert Sperling stood at the very core of at least the heroin phase of the conspiracy. In the face of this, the record makes it clear that the transaction was not one contemplated by Sperling and, indeed, brusquely condemned by him. Describing a meeting at the Mileto home in Bellmore, between Sperling and her husband, Mrs. Mileto testified as follows:

> "Q. Was your husband arrested in February of 1972?
>
> A. Yes, he was.

Q. How did you come to find that out?

A. When he came out on bail.

Q. What did he tell you about his arrest?

* * * *

A. He told me that a cowboy had arrested him. He was laying on the floor of our Thunderbird, and the agent came up and asked him what he was doing; and he said I am just laying here. And he arrested him with - I don't know, a few kilos of heroin. He was supposed to be making a delivery to Mark Reiter and he was arrested.

Q. Shortly after that, did you have a conversation with Mr. Sperling or did you overhear a conversation between Mr. Sperling and your husband?

A. Yes, I did.

Q. Where did that take place?

A. In my home in Bellmore. Mr. Sperling came in very angry. He told my husband -

* * * *

A. He started yelling at my husband; 'I told you I didn't want you to do business with Mark Reiter - Mark.'

He said 'I told you how to make deliveries. If you had listened to me, things like this wouldn't happen.'

> He said, 'this is coming out of your end. It is coming off the top.' " (T 54 - 55)

Joseph Conforti's testimony similarly reflected Sperling's displeasure with Louis Mileto following his February arrest. (T 698 - 700)

There can be no question, therefore, that the Mileto involvement with the "Carter sale" was not made in furtherance of the conspiracy charged in the Indictment and, therefore, should have been stricken. The additional prejudice from the introduction of this testimony is evidenced by the fact that the drugs introduced were permitted to remain on the prosecutor's table. UNITED STATES v. FALLEY, 489 F.2d 33 (2nd Cir., 1973).

POINT VII

APPELLANT, BENJAMIN MALLAH, RESPECTFULLY JOINS IN THE ARGUMENTS RAISED BY HIS CO-DEFENDANTS IN THIS COURT INSOFAR AS THEY ARE APPLICABLE TO HIM.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the conviction herein should be reversed and the Indictment dismissed or, in the alternative, that the case be remanded to the District Court for a new trial.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant

GERALD L. SHARGEL
Of Counsel

Service of three (3) copies of the within
Affidavit of Mailing is hereby admitted
this 26th day of April, 1971

.....

Attorney(s) for